Supreme Court, U. S.
FILED
OCT 24 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6221

Johns-Manville Products Corporation,
Appellant

v.

Commissioner of Revenue Administration,
Appelee

On Appeal From the Supreme Court
of the State of New Hampshire

JURISDICTIONAL STATEMENT

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October, 1975

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In the Supreme Court of the United States
October Term, 1975

No.

Johns-Manville Products Corporation, Appellant

v.

Commissioner of Revenue Administration, Appellee

On Appeal from the Supreme Court
of the State of New Hampshire

JURISDICTIONAL STATEMENT

Johns-Manville Products Corporation appeals from the judgment of the Supreme Court of the State of New Hampshire entered on July 31, 1975 dismissing an appeal from a decision of the New Hampshire Board of Taxation, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire dated July 31, 1975 is not yet reported. A copy of that opinion is appended hereto as Appendix A. The opinion of the New

Hampshire Board of Taxation dated September 17, 1974 is not reported. A copy of that opinion is appended hereto as Appendix B.

GROUNDS OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (2), this being an appeal which draws into question the validity of certain portions of RSA 77-A, the New Hampshire Business Profits Tax, on the grounds that they are repugnant to the Constitution of the United States.

Appellant seeks review of a judgment of the New Hampshire Supreme Court dated and entered on July 31, 1975. Timely notice of appeal to this Court was filed with the Supreme Court of New Hampshire on October 6, 1975, and with the New Hampshire Board of Taxation on October 6, 1975. A copy of the Notice of Appeal is attached hereto as Appendix C.

As the Supreme Court of New Hampshire explicitly rejected appellant's constitutional challenge to RSA 77-A, this matter is appropriately brought to this Court by appeal pursuant to 28 U.S.C. §1257 (2). *American Oil Co. v. Neill*, 380 U.S. 451 (1965); *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182 (1945); *Butler Bros. v. McColgan*, 315 U.S. 501 (1942); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931).

This case involves the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States and New Hampshire RSA 77-A:1 and RSA 77-A:3 which are set forth in Appendix D.

QUESTION PRESENTED

Whether, consistent with the Due Process Clause of the Fourteenth Amendment of the United States Constitution, New Hampshire may impose a tax on the business profits of a multistate corporation arising from the sale of timberland neither located in New Hampshire nor used in connection with business of the corporation conducted in whole or in part in New Hampshire.

STATEMENT OF THE CASE

The State of New Hampshire imposes a tax on the business profits of enterprises[1] which are organized for gain or profit and which derive economic benefit from the employment of property or labor or both within the state. RSA 77-A:1. Tax liability is calculated with reference to the amount of income shown on the enterprise's federal income tax return less certain deductions not relevant to the issue raised in this appeal. RSA 77-A:1, III, IV.

In the case of multi-state enterprises, RSA 77-A:3 provides for apportionment of business profits. Apportionment is accomplished through application of a three factor formula averaging the percentages of an enterprise's total (1) real and tangible personal property, (2) payroll and (3) sales in New Hampshire. The three factor formula is similar to that of the Uniform Division of Income For Tax Purposes Act and that of many other states. J. HELLERSTEIN, STATE AND LOCAL TAXATION 309, n. 7 (1969).

Unlike the Uniform Act and statutes in many states, RSA 77-A does not provide for separate accounting or specific allocation or any other method to exclude from the tax base before apportionment business profits of an enterprise derived from business activity outside of New Hampshire.[2] Provisions in RSA 77-A:3 which once provided for "separate accounting" and "the employment of any other method to effectuate an equitable allocation and apportionment of business profits" were deleted from the statute in 1971. Ch. 515:3, N.H. Laws, 1971.

The appellant, Johns-Manville Products Corporation (sometimes referred as "the corporation") is a Delaware corporation with headquarters in the State of New York. The corporation is engaged primarily in the manufacture and sale of pipe,

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[1]Except such enterprises as are expressly made exempt from income taxation under the United States Internal Revenue Code (1954) as amended, and except such enterprises state taxation of which is limited by United States Code Chapter 12, Section 548, as amended, so long as such limitation exists.

[2]The only adjustment of the three factor formula specified by RSA 77-A:3 is "modification or exclusion of one or more of the apportionment factors" — an adjustment which would not be helpful in this case.

diatomite, commercial and industrial insulations and various other industrial specialties. In 1971, it conducted business in sixteen states including New Hampshire and Mississippi.

In 1946, the corporation acquired approximately 36,000 acres of timberland in the State of Mississippi to which additional acreage was added from time to time. The stand of timber was used as a raw material in the production of insulating board at a plant in Natchez, Mississippi.

In 1965, the insulating board process was converted to a mineral based operation, and thereafter timber was not used in the corporation's business. Beginning in 1965, therefore, the Mississippi land was held by the corporation solely as an investment. In 1971, it was sold. The sale resulted in a federal taxable capital gain to the corporation of $15,935,170. The State of Mississippi pursuant to its Income Tax Law of 1952 specifically allocated to itself and taxed 100 percent of the gain in question claiming that the gain was derived solely from sources within Mississippi.

Federal taxable income before net operating loss deduction and special deductions ("gross business profits") is the basis for computation of appellant's New Hampshire Business Profits Tax liability. RSA 77-A:1, III(b). Although RSA 77-A did not specifically authorize a deduction of the $15.9 million gain from the sale of the Mississippi timberland in computing New Hampshire Business Profits Tax liability, appellant deducted that amount from its gross business profits of $22.6 million. The three factor apportionment formula set forth in RSA 77-A:3 was then applied to the resulting balance of $6.6 million to compute the corporation's New Hampshire Business Profits Tax liability for 1971.

The Commissioner of Revenue Administration assessed a deficiency based on failure of the corporation to include the profits from the sale of the Mississippi timberland in computing New Hampshire Business Profits Tax liability. On July 3, 1974, Johns-Manville Products Corporation filed a timely appeal of the assessment with the New Hampshire Board of Taxation alleging in part in its appeal petition that the tax sought to be imposed by New Hampshire bore no relationship to the corporation's business activity in New Hampshire and would thus be in violation of the Due Process Clause of the Constitution.

A hearing was held by the Board of Taxation on August 28, 1974, and by opinion dated September 17, 1974, the Board affirmed the assessment of the deficiency by the Commissioner of Revenue. In its opinion the Board of Taxation stated:

> In 1965 the insulating board process was converted to a mineral based operation and thereafter the timber was held as an investment by the corporation. The decision to sell the land in 1971 was made on the basis of a lack of an adequate rate of return on its investment. That no wood was harvested from 1965 to 1971 is immaterial. The land was held for the business purpose of producing profits. It therefore comes within the terms of RSA 77-A:3.

The Board further stated that it had "no jurisdiction to decide the constitutional question".

On September 26, 1974 the corporation petitioned the New Hampshire Board of Taxation for a rehearing. The petition for rehearing was denied on October 2, 1974.

Pursuant to New Hampshire RSA 541, the corporation appealed on October 28, 1974, from the decision of the Board of Taxation to the New Hampshire Supreme Court. It again alleged in its petition that the tax sought to be imposed bore no relationship to the corporation's business activity in New Hampshire and was therefore repugnant to the Due Process Clause of the Constitution.

In its opinion of July 31, 1975, the New Hampshire Supreme Court held that the appellant had "failed to show by clear and cogent evidence that the order appealed from results in the taxation of extraterritorial values. *Butler Bros. v. McColgan, supra.*"

QUESTION IS SUBSTANTIAL

The opinion of the New Hampshire Supreme Court upholding the constitutionality of RSA 77-A, as applied in this case, presents a substantial question warranting the acceptance of jurisdiction by this Court. The importance of the question raised

here is indicated by the fact that a substantial number of states impose direct net income taxes on corporations. See *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). The state tax revenue generated by these taxes has increased dramatically over recent decades so that these taxes now provide a significant source of states' revenues. Note, *Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 1000 (1962).

This Court has clearly established that a state may not impose a tax which "operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction" *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 134 (1931). *See also Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 79 (1938); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920). However, there are few cases which have delineated specific considerations relevant to a determination of what income is or is not properly attributable to transactions within a taxing jurisdiction.

The particular importance of the issue to Johns-Manville Products Corporation is indicated by the very substantial manner in which the corporation's 1971 New Hampshire tax liability is affected. According to the three factor formula prescribed in RSA 77-A:3, 1.6 percent of the corporation's business activity during 1970 and 2.1 percent of its activity during 1971 was carried on in New Hampshire. Despite this comparatively small fluctuation in New Hampshire business activity and the fact that the total corporate income from operations increased only about three times in 1971 over that of 1970, appellee's computation of the corporation's taxable New Hampshire business profits of $458,511 for 1971 is more than eleven times greater than the $41,420 taxable profits of the year before.

This Court has stated that as far as due process is concerned, the only question is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the [taxing] state." *Wisconsin v. J. C. Penny Co.*, 311 U.S. 435, 444 (1940). The test is whether the state is taxing only income "created by business within its borders." *Butler Bros. v. McColgan*, 315 U.S. 501, 507 (1942).

Appellant does not dispute the constitutional validity of apportioning the unitary income of a multi-state corporation in the manner specified by RSA 77-A:3. *Butler Bros. v. McColgan, supra*; *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931); *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*, 266 U.S. 271 (1924); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920). What is contested is the validity of a state statute which apportions the income of a multi-state corporation without first deducting specific items of corporate income unrelated to unitary business activity conducted in part in the taxing state. Appellant submits that a state statute which taxes profits from the sale of unimproved real estate held solely for investment and located in another state is one of the clearest examples of taxation which operates to reach profits in no just sense attributable to transactions within the taxing state.

In *Hans Rees' Sons, Inc. v. North Carolina, supra* at 133, this Court stated that "undoubtedly, the enterprise of a corporation which manufactures and sells its manufactured product is *ordinarily* a unitary business, and all the factors in that enterprise are essential to the realization of profits" (emphasis added). In this case, however, the Mississippi timberland was not a part of appellant's unitary business activity at the time of its sale in 1971. It was rather an asset which did not contribute and was not essential to the realization of profits in the conduct of the corporation's unitary manufacturing business. Nor was any aspect of the conduct of the manufacturing business a contributing factor to generating the profits from the sale in question. The profits from the sale of the unimproved land were generated solely as a result of the general increase in land values between 1946 and 1971.

This case is different from *Butler Bros. v. McColgan, supra*, in which this Court held that apportionment of total corporate income was appropriate because of the " 'relative contribution of the activities in the various states to the production of the total unitary income' " and because there was no showing that "income unconnected with the unitary business had been used in the formula". 315 U.S. at 509. In that case, this Court recognized that functionally Butler Brothers' operations in various states were closely integrated and were able to benefit from various

economies such as those attributable to volume purchasing for the corporation's multi-state business. *Supra* at 508. Operations in one state both benefited and were benefited by operations in the other states so that apportionment of total income was appropriate.

Appellant does not contend that income of a multi-state corporation generated by the sale of assets located outside of the state and held solely for investment rather than used directly in the unitary business of the corporation is necessarily constitutionally immune from inclusion in the income tax apportionment base of that state, *e.g., Great Lakes Pipe Line Co. v. Commissioner of Taxation*, 272 Minn. 403, 138 N.W. 2d 612 (1965), where the investment assets were integrally used in operation of the corporation's unitary business. However, where the income generated by such assets and that generated by the corporation's unitary business activity are in no way dependent upon one another, income generated by the independently held assets is not constitutionally available for taxation by a state merely because the corporation conducts part of its unitary business activity there, *e.g., Square D Co. v. Kentucky Board of Tax Appeals*, 415 S.W. 2d 594 (Ky. Ct. App., 1967); *Montgomery Ward & Co. v. Commissioner of Taxation*, 276 Minn. 479, 151 N.W. 2d 294 (1967) (dictum); *Gulf Oil Corp. v. Clayton*, 267 N.C. 15, 147 S.E. 2d 522 (1966).

As this Court stated in *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 133 (1931) "when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases." Appellant submits that New Hampshire's method of apportioning its profits without first deducting the profits from the sale of the timberland in question reaches more in this case than "only [its] profits earned within [this] State." *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920). New Hampshire has thus applied RSA 77-A in a way which is arbitrary and unreasonable in this case and is thus unconstitutional.

CONCLUSION

It is respectfully submitted that the constitutional question presented is substantial and that this Court should note probable jurisdiction and set the matter for argument.

Respectfully submitted,

Dudley W. Orr, Counsel for
Johns-Manville Products Corporation,
the Appellant

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Appendix A

OPINION AND JUDGMENT OF THE NEW HAMPSHIRE SUPREME COURT DATED JULY 31, 1975

No. 7048

Johns-Manville Products Corporation

v.

Commissioner of Revenue Administration

PER CURIAM. This is an appeal under RSA ch. 541 from the decision of the board of taxation (board) to include in plaintiff's business profits tax liability (RSA ch. 77-A) an allocable portion of the gain from the sale of timberland in Natchez, Mississippi.

Plaintiff is a Delaware corporation with places of business in New Hampshire, Mississippi and fourteen other states. It is engaged primarily in the manufacture of pipe, diatomite, insulations and various industrial specialties. It operates manufacturing facilities in Nashua and Tilton, New Hampshire.

In 1946, it acquired about 36,000 acres of land in Mississippi. More acreage was added at various times between 1946 and 1970. It was acquired to provide timber to be used in the production of insulating board at its plant in Natchez. In 1966, the insulating board process was converted to a mineral based operation and plaintiff discontinued its wood fiberboard production in Mississippi and disposed of all its plant and equipment used in that operation.

Plaintiff continued to hold the land as an investment but did not make use of it and claims it intended never again to make use of it in carrying on any of its manufacturing business. The sale of the land in December 1971 resulted in a federal taxable gain of $15,935,170.00. Mississippi taxed the entire gain.

The board by its opinion of September 17, 1974 affirmed the action of the commissioner who had allocated a portion of the gain to New Hampshire. Rehearing was denied on October 2, 1974 and this appeal was thereafter filed.

The board found that the "timberland is attributable to business activity in New Hampshire" and that after the plaintiff stopped using the timber in its business, "the timberland was held as an investment by the corporation. The decision to sell the land in 1971 was made on the basis of a lack of an adequate rate of return on the investment. That no wood was harvested from 1965 to 1971 is immaterial. The land was held for the business purpose of producing profits. It therefore comes within the terms of RSA 77-A:3". The board did not pass on plaintiff's claim that the allocation was unconstitutional because of multiple taxation.

RSA 77-A:3 before its amendment (RSA 77-A:3 (Supp. 1973)) applies. It provides for the allocation to New Hampshire of a portion of a corporation's gross income derived from activities both within and without the state. The allocation is determined by a three-factor formula based on the percentage which 1) real and personal property, 2) payroll, and 3) sales in this state bear to the same factors everywhere. Provision is made for adjustment if the application of this formula does not fairly represent the company's activity in this state.

It is not disputed that the general law is as stated in plaintiff's comprehensive brief. A corporation conducting business both within and without a state may be taxed by that state on the basis of that part of the corporation's total income as is attributable to the taxing state determined by a formula similar to that provided in RSA 77-A:3. *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1930); *Butler Brothers v. McColgan*, 315, U.S. 501 (1942).

The assumption is made that all the income is reasonably related to the business activity in the taxing state because the business is a "unitary" one. Plaintiff does not dispute that except for this timberland its business is a unitary one. If any part of the total income is not, however, so related and may be identified, taxing any part of it would violate due process. *Hans Rees' Sons, Inc., supra.* One who attacks an apportionment arrived at under the formula "carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed". *Butler Bros. v. McColgan, supra* at 507.

In this case, the timberland was acquired and used for the

purpose of supplying the needs of plaintiff's unitary business until 1965. The board found that thereafter the land was being held for the "business purpose of producing profits" and that it was sold because it was not producing an adequate rate of return.

Even income from intangibles originally purchased only for investment purposes have been held taxable on an apportionment basis where the investment was held as a means of furthering the unitary business, was carried on the books as an asset, was purchased with income produced by the unitary business, the same officers controlled the business and the investment, and where the income and any gain was comingled with other income and used in the business. *Great Lakes Pipe Line Co. v. Commissioner of Taxation*, 272 Minn. 403, 138 N.W. 2d 612 (1965); *Montgomery Ward & Co. v. Commissioner of Taxation*, 276 Minn. 479, 151 N.W. 2d 294 (1967). The case for the defendant is even stronger here. The timberland was not originally purchased as an investment but was acquired and used as an integral part of plaintiff's unitary business for nineteen years. It then became obsolete for the purpose for which it had been purchased and used. The fact that it was not sold for six years during which time it was being held as an investment did not change its character as an asset of the unitary business.

Not only has the plaintiff failed to meet its burden under RSA 541:13 to show that the decision of the board was clearly "unreasonable or unlawful", but it has also failed to show by clear and cogent evidence that the order appealed from results in the taxation of extraterritorial values. *Butler Bros. v. McColgan, supra.*

Plaintiff argues further that since Mississippi has taxed the entire gain, the decision of the board will result in multiple taxation. Even if this were a valid objection, (*Illinois Cent. R. Co. v. Minnesota*, 309 U.S. 157 (1940); *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *General Motors Corp. v. Washington*, 377 U.S. 435 (1964)), plaintiff's complaint should not be directed against New Hampshire whose tax is fairly apportioned and constitutionally proper.

Appeal dismissed.

Appendix B

OPINION OF THE STATE OF NEW HAMPSHIRE BOARD OF TAXATION DATED SEPTEMBER 17, 1974

Johns-Manville Products Corporation v. Director

A hearing was held on August 28, 1974 at which Taxpayer and the State appeared.

Taxpayer owned a certain timberland in Mississippi. The land was sold in December, 1971 and a gain was realized. The New Hampshire Commissioner of Revenue allocated a portion of the gain to New Hampshire. Mississippi taxed the entire gain.

Taxpayer contends that no part of the gain should be allocated to New Hampshire on two grounds:

1) such gain is in no way attributable to business activity in New Hampshire.
2) such allocation would be unconstitutional because of multiple taxation.

As to the second ground of taxpayer's contention the Board has no jurisdiction to decide the constitutional question and accordingly the Board does not.

The Board finds that the timberland is attributable to business activity in New Hampshire. Prior to 1965 the corporation produced an insulating board at Natchez, Mississippi. The wood harvested from the timberland was used in the production of the insulating board and the timberland had been acquired to provide a source of the wood needed. In 1965 the insulating board process was converted to a mineral based operation and thereafter the timber was not used in the corporate business. However, the timberland was held as an investment by the corporation. The decision to sell the land in 1971 was made on the basis of a lack of an adequate rate of return on its investment. That no wood was harvested from 1965 to 1971 is immaterial. The land was held for the business purpose of producing profits. It therefore comes within the terms of RSA 77-A:3.

The ruling of the Commissioner of Revenue is affirmed.

So ordered.

BOARD OF TAXATION

Appendix C

IN THE SUPREME COURT OF
THE STATE OF NEW HAMPSHIRE

Johns-Manville Products Corporation

Appellant

v.

Commissioner of Revenue Administration

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Johns-Manville Products Corporation, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of New Hampshire dismissing appellant's appeal, entered on July 31, 1975.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

/s/ Dudley W. Orr
Dudley W. Orr, Counsel for the
Appellant

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October 6th, 1975

Certificate of Service

I hereby certify that on this 6th day of October, 1975, copies of this Notice of Appeal to the Supreme Court of the United States were mailed, postage prepaid, to Charles G. Cleaveland, attorney in the Attorney General's Office of the State of New Hampshire and counsel for the Commissioner of Revenue Administration, appellee herein. I further certify that all parties required to be served have been served.

/s/ Dudley W. Orr
Dudley W. Orr, Counsel for the
Appellant

Certificate Of Filing Of Notice Of Appeal To
The Supreme Court Of The United States

I hereby certify that on this 6th day of October, 1975, this Notice of Appeal to the Supreme Court of the United States was filed with George S, Pappagianis, Clerk of the New Hampshire Supreme Court, which is in possession of a portion of the record in the above-entitled case and also with Henry Spaloss, Chairman of the Board of Taxation which is in possession of a portion of the record in the above-entitled case.

/s/ Dudley W. Orr
Dudley W. Orr, Counsel for the
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October 6, 1975

Appendix D

STATUTORY PROVISIONS

RSA 77-A:1 Definitions. When appearing in this chapter:

I. "Business Organization" means any enterprise, whether corporation, partnership, sole proprietorship, association, business trust, real estate trust or other form of organization, which

is organized for gain or profit and which derives economic benefit from the employment of property or labor or both within the state, except such enterprises as are expressly made exempt from income taxation under the United States Internal Revenue Code (1954) as amended and except such enterprises state taxation of which is limited by United States Code Chapter 12, section 548 as amended, so long as such limitation exists.

II. "Commission" means the state tax commission.

III. "Gross Business Profits" means:

(a) In the case of a corporation or any other business organization required to make and file a United States corporation income tax return, the amount shown as "taxable income before net operating loss deduction and special deductions" on such return, or in the case of a corporation which elects treatment as a small business corporation under the United States Internal Revenue Code (1954) as amended, the amount shown as "taxable income" on its United States small business corporation income tax return;

(b) In the case of a corporation which does not make and file a separate United States corporation income tax return for itself because it is a member of an affiliated group pursuant to the provisions of Chapter 6 of United States Internal Revenue Code (1954) as amended, the amount which would be shown as "taxable income before net operating loss deduction and special deductions" on such a return if it were not a member of such a group;

(c) In the case of a partnership or any other business organization required to make and file a United States partnership return of income, the amount shown as "ordinary income" plus the amount shown as "payments to partners — salaries and interest" plus the net amount of any gains from the sale of capital assets of the partnership shown on such return;

(d) In the case of a proprietorship, the amount shown as "net profit" on Schedule "C", or equivalent schedule, of the proprietor's United States income tax return, and the amount shown as net income from rents on Schedule "E", or equivalent schedule, of such return, as applicable, plus the net amount of

any gains from the sale of assets held for use in the business activity described in said Schedule "C" or held for rental purposes, as shown on said return;

(e) In the case of a farm proprietorship, the amount shown as "net farm profit" on Schedule "F", or equivalent schedule, of the farmer's United States income tax return plus the net amount of any gains from the sale of assets held for use in farming, as shown on said return;

(f) In the case of a trust or estate, the amount shown as "net income from trade or business" on the statement attached to its United States fiduciary income tax return, plus the net income from rents and the net amount of any gains from the sale of assets held for use in trade or business or for rental purposes, as shown on said return;

Provided that if a partnership, proprietorship, farm proprietorship or trust has elected the installment method of reporting gains from the sale of real or personal property pursuant to section 453 of the United States Internal Revenue Code (1954) as amended, it may apply to the commission for leave to include in its gross business profits for any taxable period only that portion of such gain as has been recognized in such taxable period for Federal Income Tax purposes, which leave shall be granted unless the commission has reason to believe that the balance of any tax due on account of the whole amount of the gain will not be duly reported and paid.

IV. "Taxable Business Profits" means gross business profits reduced by the method of allocation provided in RSA 77-A:3 and the deductions allowable under RSA 77-A:4.

V. "Taxable Period" means the calendar year or fiscal year which the taxpayer uses for United States income tax purposes, or that part of a year for which a return is made.

RSA 77-A:3 Apportionment.

A business organization (a) which derives gross business profits from business activity both within and without this state and (b) which is subject to a net income tax, a franchise tax measured by net income or a capital stock tax in another state or is subject to the jurisdiction of another state to impose a

net income tax or capital stock tax upon it whether or not such tax is or is not actually imposed, shall apportion its gross business profits so as to allocate to this state a fair and equitable proportion of such business profits. Except as hereinafter provided, such apportionment shall be made on the basis of the following three factors, equal weight to be given to each:

I. The percentage of value of the total real and tangible personal property employed by the business organization everywhere as is employed by it in the operation of its business within this state;

II. The percentage of the total wages, salaries, commissions and bonuses disbursed by the business organization to employees and salesmen everywhere as is disbursed by it for services rendered within this state. Such compensation is deemed to be disbursed for services in this state if the service is performed entirely within this state, or if the service is performed both within and without this state and the service performed without this state is incidental to the service within this state, or some of the service is performed in this state and (1) the base of operations or, if there is no base of operations the place from which the service is directed or controlled is in this state or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual performing such service resides within this state;

III. The percentage of the total sales (including charges for services) made by the business organization everywhere as is made by it within this state. Sales of tangible personal property are made in this state if the property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of f.o.b. point or other conditions of sale, or the property is shipped from an office, store, warehouse, factory or other place of storage in this state and (1) the purchaser is the United States government or (2) the business organization is not taxable in the state of the purchaser. Sales other than sales of tangible personal property are in this state if the income-producing activity is performed in this state, or the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance. The average of the three percentages shall be applied to the total gross business profits of the business organization to ascertain its gross business profits in this state. If this method of apportionment does not fairly reflect the extent of the business activities of a business organization within this state, the business organization may petition for, or the commissioner may require modification or exclusion of one or more of the apportionment factors to effectuate an equitable apportionment of business profits. The business organization is entitled to a hearing by the commissioner on request in connection with any change in its apportionment procedure and has the right of appeal from the commissioner's determination as provided in RSA 77-A:14.

Supreme Court, U. S.
FILED
DEC 3 1975
MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-622

JOHNS-MANVILLE PRODUCTS CORPORATION,
Appellant

v.

COMMISSIONER OF REVENUE ADMINISTRATION,

Appellee

On Appeal from the Supreme Court
of the State of New Hampshire

MOTION TO DISMISS OR AFFIRM

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No. 75-622

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MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the decision of the Supreme Court of the State of New Hampshire on the grounds first, that the decision is not appealable under 28 U.S.C. §1257(2); second, that the decision rests upon an adequate non-federal basis; third, that such federal questions as are involved are so unsubstantial as not to warrant further review.

I.

THE STATUTE INVOLVED AND THE NATURE OF THE CASE

This is a purported appeal under 28 U.S.C. §1257(2) from a decision of the Supreme Court of New Hampshire dismissing an appeal from the New Hampshire Board of Taxation for failure to meet the statutory burden of proof on appeal. The appellant is subject to taxation under New Hampshire Revised Statutes Annotated Chapter 77-A as amended (hereinafter RSA 77-A), applicable portions of which are reproduced in Appendix D to appellant's Jurisdictional Statement. The appellant is a multi-state corporation and, as such, is entitled to apportion its gross business profits under RSA 77-A:3 by the widely recognized three-factor formula set out therein. Only that portion of gross business profits reasonably related to activities within New Hampshire, as measured and determined by the formula, is subject to taxation by New Hampshire. The formula is subject to modification by the Commissioner of Revenue upon petition of the taxpayer.

The appellant was taxed under RSA 77-A in 1971 upon gross business profits, before apportionment, of $22.6 million, which included $15.9 million in gain from the sale of timberland located in Mississippi. The appellant objected to the inclusion of the $15.9 million gain in gross business profits before apportionment, asserting that the gain bore no reasonable relation to its activities in New Hampshire.

The Board of Taxation, upon hearing, found upon all the evidence submitted that the gain was attributable to activities in New Hampshire, and sustained its inclusion by the appellee. The text of the Board's decision is set out in Appendix B to appellant's Jurisdictional Statement.

The New Hampshire Supreme Court, on appeal, affirmed the Board's conclusion, finding that the timberland was an asset of the appellant as a "unitary" business, and the gain therefrom properly included in the appellant's gross business profits before apportionment. The Court held that the appellant

had failed to meet the burden under RSA 541:13 of showing "by a clear preponderance of the evidence . . . [that the] order is unjust or unreasonable", and accordingly dismissed the appeal. No record of testimony before the Board of Taxation was prepared, although the appellant had the option of providing for one if it had so desired.

The Court's opinion is not yet reported; however, the text of the opinion is set out in Appendix A to the appellant's Jurisdictional Statement.

II

ARGUMENT

A. *An Appeal Does Not Lie Under 28 U.S.C. 5§1257(2)*

The appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257(2). That section provides review only where a state statute is challenged on its face, or as applied to the challenger, on the ground that it is repugnant to the constitution, treaties, or laws of the United States, and the state court decision holds the statute valid. The appellant herein concedes that the procedure under RSA 77-A:3 for "apportioning the unitary income of a multi-state corporation" is constitutionally valid. Jurisdictional Statement, at 7. Rather, the appellant casts its own case as a challenge to "the validity of a state statute which apportions the income of a multi-state corporation without first deducting specific items of corporate income *unrelated to unitary business activity* conducted in part in the taxing state". *Id.*, at 7 [emphasis added]. An examination of the decision below, however, plainly shows that this is not such a case, and that RSA 77-A is not such a statute.

This is not such a case because the income in question was, upon the evidence presented, found by the trier of fact to be

related to the appellant's unitary business activity. The appellant, then, comes to this Court with a question of law framed upon facts wholly at variance with the findings of fact below. Let us assume, *arguendo*, that RSA 77-A does, as appellant suggests, prohibit any exclusion of specific items of income prior to apportionment; nevertheless, the appellant is not entitled to an exclusion, not because the statute forbids it, but because the income in question is related to the unitary business activity. Thus, upon the facts in this case, the appellant has no standing to challenge RSA 77-A on the ground that it prohibits exclusion of income unrelated to unitary business activity.

Moreover, RSA 77-A is not such a statute as appellant suggests. The appellant's contention that RSA 77-A flatly prohibits exclusion of any items of income prior to apportionment assumes a point which clearly was not decided by the New Hampshire Supreme Court, there having been no occasion to do so.

Thus, it becomes clear that the appellant by its own admission is not claiming that RSA 77-A is unconstitutional on its face; and is not claiming that the statute is void as applied to the facts found in this case. Indeed, given the finding that the income in question was related to unitary business activity, the appellant's own arguments compel the conclusion that its taxation under RSA 77-A was constitutionally proper. Jurisdictional Statement, at 7. *Butler Bros.* v. *McColgan*, 315 U.S. 501 (1942). Rather, the appellant's case reduces to a claim that the appellant's constitutional right to due process prevents the application of RSA 77-A to it with respect to the income in question, and the decision below is but a denial of the assertion of that right as a bar to such application. Review of such decisions and claims may be had only by certiorari under 28 U.S.C. §1257(3). *Mergenthaler Linotype Co.* v. *Davis*, 251 U.S. 256 (1920); *Charleston Federal Savings & Loan Ass'n.* v. *Alderson*, 324 U.S. 182 (1945); *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U. S. 1 (1920); *Wilson* v. *Cook*, 327 U.S. 474 (1946); *Rohr Aircraft Corp.* v. *San Diego County*, 362 U.S. 628 (1960).

This Court reached the same result in an analogous case involving a state statute providing for constructive service, where the claim was not that "the statute was invalid as

applied, but rather than the effect of the state court's exercise of jurisdiction in the circumstances" was a deprivation of constitutional rights. *Hanson* v. *Denckla*, 357 U.S. 235, 244 (1958). See also: *Ex Parte Bransford*, 310 U.S. 354, 361 (1940).

For the reasons above, this attempted appeal under 28 U.S.C. §1257(2) should be dismissed for want of jurisdiction.

B. *The Decision Below Rests Upon An Adequate Non-Federal Basis*

The decision of the New Hampshire Supreme Court by its own terms is grounded upon a non-federal basis sufficient by itself to support the dismissal of the appeal to that Court.

The New Hampshire Supreme Court noted that both parties before it were in agreement upon the law of the case, and parted ways only with respect to the finding that the income in question was related to the unitary business of the appellant. Since the finding to that effect was made by the original trier of fact, the Board of Taxation, and the appellant caused no record of testimony to be preserved upon which review of that finding could be based, the Supreme Court held that the appellant had failed to sustain its burden of showing that the trier of fact was arbitrary or capricious in finding as it did.

Moreover, it is fair to say that, since the parties before it were in agreement as to the applicable law, and disagreed only upon the finding that the timberland was an asset of the unitary business, the Court did not "decide" a federal question at all, but merely reviewed the Board's decision with respect to the contention that it had no basis in evidence.

That this Court will not review cases which turn upon non-federal grounds, or which turn upon questions of fact determined by state courts, is settled beyond question. *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Grayson* v. *Harris*, 267 U.S. 352 (1925); *Fry Roofing Co.* v. *Wood*, 344 U.S. 157 (1952), rehearing denied, 345 U.S. 913 (1953).

C. *The Question Raised Is So Unsubstantial As Not To Need Further Argument.*

As the arguments set out above and the text of the opinion below amply demonstrate, the outcome of this case has turned at all stages upon the question whether the timberland sold by the appellant was an asset of its unitary business, and not upon the question whether RSA 77-A is constitutional.

The cases advanced by the appellant in support of its position that the timberland was not an asset of the unitary business (Jurisdictional Statement, at 8) are uniformly inapposite. Each involves an instance of dividend income from a subsidiary, but wholly separate and distinct, corporation. The "investment" in the subsidiary was found to be sufficiently severable as not to be considered a part of the unitary business. But no separate entity is involved here, since the appellant itself held title to the land (at least as it appears from the record) and reported the gain from the sale on its own federal tax return. The involvement of the timberland with appellant's unitary business was, we submit, greater by an order of magnitude than that present in cases involving ownership of stock in subsidiary corporations. The finding in this case is entirely reasonable upon the evidence presented, and ought not to be disturbed on appeal.

The "federal question" involved in this case, then, is one which is well settled, *Butler Bros., supra*, and which is not really a contested issue between the parties. The record discloses no evidence which would cause the Board of Taxation's finding to be labeled arbitrary, so the decision of the New Hampshire Supreme Court is plainly correct, and no further argument of the case is necessary.

III
CONCLUSION

For the reasons set out above, the appellee respectfully urges the Court to grant the Motion to Dismiss or Affirm herewith submitted.

Respectfully submitted,

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